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No. 06-1087

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PETER LUKS,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent provides the following corporate disclosure.

Respondent Baxter Healthcare Corporation ("Baxter") is a publicly traded corporation. Its parent company is Baxter International Inc. No publicly traded company owns 10 percent or more of Baxter's stock.

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OPPOSITION TO PETITION FOR CERTIORARI

This is an unexceptional case involving the straightforward application of federal discrimination law. As explained below, the Seventh Circuit's judgment was grounded in well-established law, raises no conflict with decisions of other circuits or this Court, and presents no issue that warrants review by the Court. Accordingly, Respondent Baxter Healthcare Corporation ("Baxter") respectfully requests that this Court deny the petition for a writ of certiorari filed by Petitioner, Peter Luks ("Luks"), seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 3, 2006.

STATEMENT

This case arises from the dismissal, under Fed. R. Civ. P. 56, of a complaint in which Luks alleged that Baxter discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* Luks' claims stemmed from the termination of his employment at Baxter where he worked as a Senior Business Systems Consultant. According to Luks, Baxter's Vice President of Architecture, Technology and Planning, John Goode, had a "plan" to get rid of the three oldest employees in the department, including Luks. Luks further asserted that the performance evaluation and corrective action plan that led to his termination were inaccurate and unfair. Finally, Luks alleged that his termination from employment was based not his poor performance, but on his age. At the time of his termination, Luks was fifty-two (52) years old, John

Goode was forty-four (44) years old, and Carol Kazl, Luks' manager who evaluated Luks' performance and terminated his employment, was forty-seven (47) years old.

Baxter moved for summary judgment on Luks' claims, which was granted by the United States District Court for the Northern District of Illinois on August 29, 2005. Luks appealed the decision and, after the parties fully briefed and orally argued the appeal, the Seventh Circuit affirmed the lower court's decision on November 3, 2006. Luks filed his petition for writ of certiorari on February 6, 2007.

REASONS FOR DENYING PETITION

The "Questions Presented" by Luks in his petition are well settled issues of law in the Seventh Circuit and other circuits: (1) Under the Age Discrimination in Employment Act, is an admission from the employer that the adverse employment action is based on age required to support the inference of age discrimination under both the direct and the circumstantial methods of proof in order for the employee to survive summary judgment?; (2) Must a court ruling on an employer's motion for summary judgment under Fed. R. Civ. P. 56 in an age discrimination case view the evidence in the light most favorable to the employee? and (3) Under the Age Discrimination in Employment Act, is evidence that each and every individual involved in the decision-making process had a discriminatory motive required to prove that the employer's reason for the adverse employment action was a pretext for discrimination? The questions presented by Luks are

not unsettled or unique in any way. Thus, there is no basis for review by this Court.

Further, to the extent that Luks really claims that the Seventh Circuit misapplied the above well-established legal principles, Rule 10 of the Supreme Court of the United States specifically states that a petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10. This case certainly is not a "rare" one warranting review by this Court.

Luks' petition indisputably mischaracterizes the legal rulings below. First, the Seventh Circuit did not hold that an actual admission of discrimination is necessary in order to survive summary judgment in a direct or circumstantial case of discrimination. Rather, as discussed *infra* in part I, the Seventh Circuit reviewed all of Luks' evidence of alleged discrimination and properly concluded that it did not support the *inference* that Luks was discharged because of his age.

Second, the Seventh Circuit continually gave Luks the benefit of the doubt by viewing the evidence in a light most favorable to him. In fact, as discussed *infra* in part II, the Seventh Circuit's decision is replete with statements such as "we may assume for the sake of argument," "the factfinder arguably could infer," "we accept Luks' construction as accurate for the present purposes," and the evidence "could be seen," clearly showing that the Court was carefully considering all of Luks' evidence as he, not Baxter, presented it.

Finally, the Seventh Circuit did not apply an incorrect pretext standard as it relates to the decision-making process. Rather, as discussed *infra* in part II, the Seventh Circuit properly focused on whether John Goode's alleged discriminatory animus played *any* role in the events culminating in Luks' termination. In sum, Luks presents no issue that requires review by this Court. Instead, he simply attempts to reargue his case, while misconstruing the holding below. Accordingly, Luks' petition for writ of certiorari should be denied.

I. THE SEVENTH CIRCUIT DID NOT REQUIRE AN ADMISSION FROM BAXTER THAT LUKS' TERMINATION WAS BASED ON AGE

The Seventh Circuit properly recognized that "direct" proof of discrimination is "not limited to near-admissions by the employer that its decisions were based on a proscribed criterion (*e.g.*, 'You're too old to work here.'), but also includes circumstantial evidence which suggests discrimination albeit through a longer chain of inferences" (Pet. App. at 6a). Likewise, the Seventh Circuit examined the "subset of circumstantial evidence" in determining whether Luks could overcome summary judgment under the "indirect" method of proof (*Id.*). In applying these well-established standards, the Seventh Circuit considered all of Luks' evidence together to determine whether he could establish age discrimination through either means. In the end, the Seventh Circuit agreed with the district court that Luks could not.

Luks attacks the Seventh Circuit's decision by minimizing (and essentially ignoring) the most

important part of his burden of proof – that his termination was *because of* his age. As the Seventh Circuit correctly concluded, Luks has presented no evidence that his termination from employment was because of his age, rather than his manager's honestly-held belief that his performance was significantly deficient in a number of areas (*Id.* at 6a). Thus, although Luks may have sufficient evidence (when viewed in a light most favorable to him) that John Goode had a "plan" to get rid of Larry Helsith, Glenn Jurmann and himself (the "three oldest" employees in the department), Luks presented no evidence that "this mosaic of evidence supports the inference that Goode's apparent wish to terminate these three employees was motivated by their age" (*Id.* at 9a).

This is true even in light of the alleged "stray remarks" made by Goode before Luks' termination. In dismissing those comments as insufficient to create an inference of age discrimination, the Seventh Circuit reviewed each alleged comment to determine whether the remarks were in any way related to the termination decision at issue in this case. In applying well-established precedent, the Seventh Circuit properly recognized that the "good old boys" and "higher energy" comments were simply not evidence of age discrimination (Pet. App. at 12a). *See Lindsey v. Baxter Healthcare Corp.*, 962 F.2d 586, 588 (7th Cir. 1992) ("No weight can be attached to an overheard comment that Baxter does not like to promote 'good old boys,' since any competent user of the English (or rather the American) language knows that to be a good old boy one need not be old, or for that matter good."); *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1113 (7th Cir.

1998) (stated preference for "new blood," individuals with "a lot of energy" and who are a "quick study" does not reflect an age bias and, in any event, was not linked to the employment decision at issue).

Further, the Seventh Circuit agreed with the lower court that the "old timers" comment constituted inadmissible hearsay — a problem Luks "made no effort to surmount" (Pet. App. at 12a).[1] Finally, the Seventh Circuit properly concluded that Goode's "old guy" joke, although made around the time of Luks' termination, was not linked in any way to the termination decision (*Id.* at 12a). Indeed, Luks does not and cannot dispute that his direct supervisor, Carol Kazl, assessed his performance, drafted the performance review and performance plan, and made the decision to terminate Luks' employment for his failure to meet the requirements of the plan. Luks offers no evidence in support of his belief that his performance plan was "fabricated" by Kazl or that Baxter "never intended him to survive the plan."

In the end, Luks' arguments in his petition are no more compelling now than they were in the district court or in the Seventh Circuit. Because Luks failed to establish that Goode's alleged dislike of older workers played *any role* in his termination from employment, the Seventh Circuit correctly concluded that no reasonable jury could infer that Luks was terminated *because of* his age. *See Cerutti v. BASF Corp.*, 349 F.3d 1055, 1060, 1063 (7th Cir. 2003); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1403 (7th Cir. 1996); *McCarthy v. Kemper Life Ins. Co.*, 924

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[1] Similarly, in his petition, Luks makes no effort to argue why the "old timers" comment does not constitute inadmissible hearsay.

F.2d 683, 686-87 (7th Cir. 1991). Luks has not established that the Seventh Circuit misapplied the controlling case law, "repealed our civil rights laws" or that there is any other legitimate reason for this Court to review the Seventh Circuit's well-reasoned decision. Accordingly, his petition for writ of certiorari should be denied.

II. THE SEVENTH CIRCUIT DID NOT APPLY THE WRONG BURDENS IN ANALYZING THE FACTS OR APPLYING THE APPLICABLE PRETEXT STANDARDS

In his petition, Luks also asserts that the Seventh Circuit applied the wrong burden of proof by not viewing the facts in a light most favorable to him. To the contrary, statements such as "in Luks' view," "as Luks interprets them," "Luks contends" and "to Luks' mind" demonstrate that the Seventh Circuit reviewed the facts as Luks, not Baxter, presented them. The Seventh Circuit, like the district court, explicitly recognized this obligation, stating at the outset: "We are, of course, obliged to construe the admissible evidence in Luks' favor in deciding whether the record presents a question of material fact that precludes summary judgment in Baxter's favor" (Pet. App. at 6a). Further confirmation of the Seventh Circuit's review of the evidence in favor of Luks is embodied in the following statement:

> According to Baxter, Goode made those remarks not during a discussion of Helsith and Jurmann, but rather in reference to individuals on a technical leadership team who had been with the company for long

> periods of time. But we accept Luks' construction as accurate for present purposes.

(Pet. App. at 11a). There is no question that the Seventh Circuit gave Luks the benefit of the doubt by resolving all material factual disputes in his favor.

Luks further suggests that the Seventh Circuit erroneously applied applicable pretext standards by requiring him to establish that everyone involved in the decision-making process harbored a discriminatory animus. Luks misconstrues the Seventh Circuit's decision. In reviewing the termination decision, the Seventh Circuit properly focused on "not whether the criticisms of his performance were right or wrong but whether his supervisor honestly believed them" (Pet. App. at 14a). *See Gusewelle v. City of Wood River*, 374 F.3d 569, 576 (7th Cir. 2004). Thus, although Luks disagreed with the criticisms of his performance and Kazl and Goode were unwilling to discuss the disagreement, "it does not show that Kazl was untruthful in her negative evaluation of Luks" (Pet. App. at 14a). Rather, at most it establishes only that Kazl "may have been mistaken in her assessment and that both she and Goode were bull-headed in their refusal to consider that possibility" (*Id.*).

Luks also argues that the Seventh Circuit erred by ignoring certain evidence of pretext. The record does not support Luks' assertion. A simple review of the district court's decision and the Seventh Circuit's decision reveals that both courts reviewed all of the evidence presented by Luks and ultimately determined that it did not evidence age

discrimination. The mere fact that each piece of evidence was not analyzed ad nauseam certainly does not establish that the underlying decisions were erroneous in any way. For example, Luks offers as evidence of pretext the fact that Goode "directed" Kazl to place him on a performance plan, much like Goode "directed" Cynthia Overby to place Helsith and Jurmann on performance plans. However, Luks ignores one critical distinguishing fact between the two alleged "directives" —unlike Overby, Kazl herself observed significant problems with Luks' performance and, therefore, drafted a performance plan to address and remedy his performance deficiencies. The fact that Kazl (who had never placed an employee on a performance plan) consulted Goode and Goode "coached" her through the process, does not in any way establish that Goode directed Kazl to "fabricate" a plan or that Kazl did not honestly believe Luks' performance was deficient. The same is true with the simple fact that Goode may have discouraged Luks from discussing his performance issues with human resources because he and Kazl believed that Luks could improve his performance and meet the objectives of his performance plan. Unlike the facts in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), Goode did not recommend, urge or otherwise initiate Luks' termination (Pet. App. at 16a) — Kazl did, with only Goode's final blessing. As the Seventh Circuit properly concluded, "there is no evidence that Kazl was a party to [John Goode's] plan and concocted false criticisms of Luks' work in an effort to carry the plan out" (*Id.*).

Finally, the Seventh Circuit properly considered Luks' last-ditch effort of establishing pretext through

alleged comparables Nathan Habeck and Terri Stevens. Consistent with applicable case law, the Seventh Circuit found that the evidence was insufficient to establish pretext for two reasons. First, Baxter could legitimately hold Luks to a higher standard of conduct given his position of leadership in the department (Pet. App. at 14a). *See Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 330 (7th Cir. 2002) (in order to be similarly situated, employees must be subject to the same standards and engage in similar conduct "without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them."). Second, because Luks only called into question some, but not all, of Kazl's criticisms of him, "the evidence does not support the inference that the overall basis for Luks' discharge was pretextual" (Pet. App. at 14a). *See Wolf v. Bus (America) Inc.*, 77 F.3d 914, 920 (7th Cir. 1996). In the end, contrary to Luks' petition, the Seventh Circuit did not weigh facts in favor of Baxter. It considered all of Luks' alleged evidence of pretext and concluded that it was insufficient to create a genuine issue of material fact.

CONCLUSION

Luks clearly has not met his burden under Rule 10 to demonstrate a "compelling reason" to grant his petition for writ of certiorari. Sup. Ct. Rule 10. The dismissal of Luks' claims was properly affirmed by the Seventh Circuit, after the appellate court appropriately applied the well established law of the circuit and this Court. There are simply no issues which warrant this Court's review or involvement. Accordingly, Baxter respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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